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In the
Supreme Court of the United States
October Term, 1985

ANTHONY J. GRACZYK, JOHN HOWARD, PETER CALACCI, and HAROLD PICARD,
Petitioners,

vs.

UNITED STEELWORKERS OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE COLLECTIVE BARGAINING AGREEMENT SIGNED ON NOVEMBER 1, 1977, AND MADE RETROACTIVE TO AUGUST 1, 1977, WAS "IN EFFECT" ON SEPTEMBER 1, 1977, WITHIN THE MEANING OF SEC. 2(B) OF THE 1978 AMENDMENTS TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT, THEREBY AUTHORIZING THE RESPONDENT'S INVOLUNTARY RETIREMENT OF THE PETITIONERS AT 65 YEARS OF AGE.

II

WHETHER THE CONSENTING PETITIONERS ARE TIME-BARRED FROM JOINING INTO THE ORIGINATING PETITIONER'S TIMELY-FILED SUIT.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit affirming the district court's grant of the Motion for Summary Judgment of the Respondent, UNITED STEELWORKERS OF AMERICA, and affirming the district court's dismissal of the additional consenting plaintiffs, Howard, Calacci, and Picard, is attached hereto as Appendix "A". The decision of the United States District Court, Northern District of Illinois, Eastern Division, is attached hereto as Appendix "B".

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was filed on May 17, 1985. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. Sec. 1254 (1977).

PERTINENT STATUTORY PROVISIONS AND FEDERAL REGULATIONS

The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Sec. 621 et seq. (1982), provides in pertinent part:

> Section 12(a), 29 U.S.C. Sec. 631(a). The prohibitions in this Act [29 U.S.C.S. Sections 621 et seq.] shall be limited to individuals who are at least 40 years of age but less than 70 years of age.
>
> Section 4(a)(1), 29 U.S.C. Sec. 623(a)(1). (a) It shall be unlawful for an employer--(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals's age.
>
> Section 4(f)(2), 29 U.S.C. Sec. 623(f)(2). It shall not be unlawful for an employer, employment agency, or labor organization . . . (2) to observe the terms of a bona fide seniority system or any bona fide retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the

failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act [29 U.S.C.S. Section 631(a)] because of the age of such individual.

Section 2(b) of P.L. No. 95-256, 92 Stat. 189, provides in pertinent part:

> The amendment [to 29 U.S.C. Sec. 623(f)(2)] shall take effect on [April 6, 1978], except that, in the case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977, which was entered into by a labor organization . . . which would otherwise be prohibited by [29 U.S.C. Sec. 631], the amendment [to 29 U.S.C. Sec. 623(f)(2)] shall take effect upon the termination of such agreement or on January 1, 1980, whichever occurs first.

Section 7(e)(1), 29 U.S.C. Sec. 626(e)(1), provides in pertinent part:

> Sections 6 and 10 of the Portal-to-Portal Act of 1947 [29 U.S.C. Sec. 259: In any action or proceeding . . . no employer shall be subject to any liability or punishment . . . if he pleads and proves that the Act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order,

> ruling, approval, or interpretation of the agency of the United States specified [Administrator of the Wage and Hour Division of the Department of Labor] of this section.] shall apply to actions under this Act.

Section 7(b), 29 U.S.C. Sec. 626(b), provides in pertinent part:

> The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections . . . 16 . . . of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)) [No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.].

The proposed rule of the Equal Employment Opportunity Commission adopting the interpretation of the Department of Labor with respect to enforcement of the Age Discrimination in Employment Act appears at 44 Fed. Reg. 68,858, 68,861, 68,862 (1979) (codified at 29 C.F.R. Section 1625.9(d)(3) (1984)), and provides:

> Section 1625.9 Prohibition of Involuntary Retirement (d)(3) Where a collective bargaining agreement expired prior to September 1, 1977, and a new agreement was signed subsequent to that date effective retroactively to the expiration date of the previous agreement, the exemption [of Section 4(f)(2) of the Age Discrimination in Employment Act] does not apply. The expressed congressional intent was to exempt only those agreements which have been "negotiated" before September 1, 1977 (see S. Rept. No. 95-493, 95th Cong., 1st Sess. (1977), p. 11; H.R. Rept. No. 95-527, Part 1, 95th Cong., 1st Sess. (1977), pp. 8-9). Id. at 68862.

The aforesaid proposed rule was officially adopted by the Equal Employment Opportunity Commission on September 29, 1981. 46 Fed. Reg. 47726, 47728 (1982) (codified at 29 C.F.R. Section 1625.9(d)(3) (1984)).

STATEMENT OF THE CASE

The Petitioners, ANTHONY J. GRACZYK ("Graczyk"), JOHN HOWARD ("Howard"), PETER CALACCI ("Calacci"), and HAROLD PICARD ("Picard") (collectively referred to as the "Petitioners") were employed by the Respondent, UNITED STEELWORKERS OF AMERICA ("USWA") as Staff Representatives. The terms and conditions of their employment were prescribed by collective bargaining agreements negotiated by their union, the Staffman's Organizing Committee ("SOC"), and the USWA. Each collective bargaining agreement under which the Petitioners worked provided for mandatory retirement at age 65, irrespective of the employee's years of service. Until April 6, 1978, mandatory retirement at age 65 was consistent with the Age Discrimination in Employment Act of 1967 ("ADEA").

On May 9, 1977, Forrest G. Reeder,

President of SOC, notified I. W. Abel, President of USWA, that SOC wished to terminate the Agreement dated August 1, 1974. The 1977 negotiations between USWA and SOC began on July 7, 1977. On July 31, 1977, the 1974 Collective Bargaining Agreement expired.

Article XI of the 1974 Agreement provided (emphasis added):

> Article XI - Termination
>
> This Agreement shall be effective as of August 1, 1974 and will continue in effect until such time as the United Steelworkers of America has completed negotiations and reach new agreement with the aluminum industry, nonferrous and basic steel industry, in 1977. Not later than 30 days thereafter, the parties will make arrangements to meet and negotiate a new Agreement. This Agreement shall continue in effect until either party notifies the other of its desire to terminate, or a new Agreement is reached by the parties. It is further understood that the effective date of any agreement reached by the parties subsequent to July 31, 1977, shall be effective August 1, 1977, unless otherwise mutually agreed.

USWA and SOC completed negotiations for the new agreement on October 12, 1977. The new contract was formally signed on November 1, 1977. In accord with the retroactive effective date commitment of Article XI of the 1974 Agreement, the new agreement stated:

> This Agreement, dated as of August 1, 1977, is between the United Steelworkers of America (hereinafter referred to as "USWA") and the Staffman's Organizing Committee (hereinafter referred to as "SOC"). Except as otherwise specified herein, the provisions of this Agreement shall be effective August 1, 1977. This Agreement supersedes and replaces the Agreement between the parties dated August 1, 1974.

Also on November 1, 1977, SOC President Reeder signed a letter from USWA President McBride confirming several understandings reached between USWA and SOC in connection with negotiations leading to the signing of the 1977 Agreement. Paragraph 3 of the McBridge letter

stated:

> Consistent with the International Union's policy of complying with federal legal requirements, in the event that federal law invalidates the current compulsory retirement age applicable to bargaining unit employees, the International Union will take such action as is required to change the mandatory retirement age to comply with such federal law.

On April 6, 1978, Congress amended the Age Discrimination in Employment Act of 1967 ("ADEA") by Public Law 95-256 to provide, inter alia, protection to individuals up to 70 years of age. Sec. 12(a), 29 U.S.C. 631(a). Section 4(a)(1), 29 U.S.C. 631(a), was amended to prohibit an employer, inter alia, from discharging any individual because of that individual's age. Section 4(f)(2), 29 U.S.C. 623(f)(2), was amended to provide that no seniority system or benefit plan, including retirement and pension plans, "shall require or permit

the involuntary retirement of any individual specified by Section 631(a) (between 40 and 70 years of age) of this title because of the age of the individual." Section 2(b) of P. L. No. 95-256 sets forth the effective date of the ADEA amendments (emphasis added):

> The amendment . . . shall take effect on the date of enactment of this Act [April 6, 1978], except that, in the case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977 . . . the amendment . . . shall take effect upon the termination of such agreement or on January 1, 1980, whichever occurs first.

Despite the cloud cast by the 1978 ADEA amendments with respect to the legality of the mandatory retirement provisions of the 1977 Agreement and despite the November 1, 1977, letter wherein USWA promised to comply with any federal law which changed the mandatory retirement age, USWA did not change its

policy. Instead, on July 21, 1978, various USWA representatives sought an informal opinion from various persons in the Department of Labor ("DOL"), the agency then responsible for enforcement of the ADEA. Based upon USWA representations, the DOL representatives orally advised that they believed USWA's 1977 agreement was in effect on September 1, 1977, for purposes of applying the ADEA amendments of 1978. This oral advice was never reduced to writing. There is no transcript of this meeting.

On January 10, 1979, Howard was notified by USWA that he would be retired on April 1, 1979, pursuant to the USWA mandatory retirement policy, and he was involuntarily retired on that date. On March 13, 1979, Calacci and Picard were notified by USWA that they would be retired on June 1, 1979, pursuant to the

mandatory retirement policy, and Calacci was involuntarily retired on that date. Picard, by reason of his impending involuntary retirement, left the employ of USWA on April 1, 1979.

On July 5, 1979, Graczyk was notified by USWA that he would be retired on October 1, 1979, pursuant to the mandatory retirement policy. On July 20, 1979, Graczyk filed a grievance protesting his impending involuntary retirement, condenting that USWA's policy violated the 1978 amendments to the ADEA; however, on October 1, 1979, Graczyk was involuntarily retired. On December 12, 1979, Graczyk filed a charge with the Chicago office of the Equal Employment Opportunity Commission ("EEOC"), [1] complaining

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[1] On July 1, 1979, Congress transferred authority and responsibility for administration and enforcement of the ADEA to the EEOC. Section 2, Reorgani-

that his involuntary retirement at age 65 was in violation of the 1978 amendments to the ADEA.

Graczyk's charge was consolidated with an identical charge against USWA filed with the Cleveland EEOC office by Frank Anness, another USWA Staff Representative. The EEOC initially authorized the filing of a complaint on behalf of Anness and Graczyk, which authorization was consistent with its recently pub-

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zation Plan No. 1 of 1978, 42 Fed. Reg. 19807, 92 Stat. 3781 (May 9, 1978). Although the viability of the EEOC's authority to enforce the ADEA was in question subsequent to Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983), on October 19, 1984, Congress enacted Public Law 98-532, 98 Stat. 2705, which ratified the reorganization plan and gave it retroactive application. At least two courts have affirmed the validity of Congress's retroactive application of said law. See EEOC v. CBS, Inc., 748 F. 2d 124 (2nd Cir. 1984), and EEOC v. Westinghouse Electric Corp., No. 84-3073 (3rd Cir. June 20, 1985).

lished interpretation that the November 1, 1977, USWA-SOC Agreement was not "in effect" on September 1, 1977, so as to delay enforcement of the 1978 ADEA amendments. See 44 Fed. Reg. 68858, 68862 (1979), officially adopted at 46 Fed. Reg. 47726, 47728 (1981). Subsequently, after being informed of the July 21, 1978, meeting between USWA and DOL representatives, the EEOC determined it would be inappropriate to file suit and rescinded authorization for the filing of a complaint.

On June 9, 1980, Graczyk instituted this action in the United States District Court for the Northern District of Illinois, Eastern Division, Anness having already instituted suit in Ohio. Jurisdiction of the district court was invoked under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C.

Section 626(b) (1982).

Subsequent to the filing of the Graczyk and Anness suits, at the request of Leroy Clark, General Counsel of the EEOC, on October 20, 1980, Donald Elisburg, one of the DOL representatives present at the July 21, 1978, meeting, furnished a letter to Clark attempting to recall the July 21 meeting, his opinion, and the representations made by USWA upon which he had based his opinion.

Finally, in May of 1981 Howard, Calacci, and Picard discovered that they had not been joined as parties to Anness's federal action, despite having signed retainer agreements on July 1, 1980, for that purpose with Anness's attorney in Ohio. On June 12, 1981, all three signed consents to opt into Graczyk's suit. On June 15, 1981, the trial court granted leave to add them as

additional parties. Their consents were formally filed on July 6, 1981.

USWA moved to reconsider the district court's order of June 15, 1981. On January 28, 1983, USWA's motion was denied and the plaintiffs were given one week to file their amended complaint adding Howard, Calacci, and Picard. Thereafter, on March 14, 1983, the trial court denied Graczyk's motion for leave to file Count II of their amended complaint instanter, stating orally its opinion that the additional consenting plaintiffs were time-barred.

On May 26, 1983, the Sixth Circuit, in Anness v. United Steelworkers of America, 707 F. 2d 917, held that USWA's mandatory retirement policy was in violation of Section 623 of the ADEA, as amended. Nevertheless, rejecting the Sixth Circuit's decision (which had been

supported by the EEOC as amicus curiae), rejecting the joint DOL-EEOC interpretation that the agreement signed on November 1, 1977, and made retroactive to August 1, 1977, was not "in effect" for the purposes of Section 2(b) of the 1978 amendments to the ADEA, and instead giving deference to Elisburg's oral opinion at the July 21, 1978 meeting, on October 7, 1983, the district court granted USWA's motion for summary judgment and denied Graczyk's motion for summary judgment. The trial court decided that the 1974 Agreement, including the provision for retirement and pensions, continued in effect between August 1, 1977, the date of its expiration, and November 1, the date the 1977 contract containing retroactive provisions was signed.

Following the October 31, 1983,

denial by the district court of the plaintiff's motions to reconsider the court's October 7, 1983, decision and the plaintiffs' additional motion to reconsider denial of leave to file Count II of their amended complaint, Graczyk, followed by Howard, Calacci, and Picard, appealed said decisions to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. Section 1291, which appeals were consolidated by the court.

On May 17, 1985, the Seventh Circuit, noting the conflict with the decision of the Sixth Circuit in Anness: (1) affirmed the district court's decision with respect to the primary question, i.e., that the 1977 collective bargaining agreement was "in effect" on September 1, 1977, for the purposes of Section 2(b) of P. L. No. 95-256 and,

therefore, that the agreement was exempt from the application of those amendments at the time of the plaintiffs' retirement; and (2) concluded that although it was error for the district court to deny the amendment of the original complaint and to dismiss the additional consenting plaintiffs, affirmed the district court's dismissal of the additional plaintiffs on the basis of its decision with respect to the the primary question. The Seventh Circuit thus found it unnecessary to determine whether the claims of the additional consenting plaintiffs were time-barred.

ARGUMENTS IN SUPPORT OF GRANTING PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 17, the Petitioners bring this Petition for Writ of Certiorari because the United States Court of Appeals for the Seventh

Circuit has rendered a decision in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in Anness v. United Steelworkers of America, 707 F. 2d 917 (6th Cir. 1983), a case identical to the instant case on the issue of statutory construction and application.

In Anness, the Sixth Circuit held that the statutory language of Section 2(b), "in effect on September 1, 1977," given its ordinary meaning, as well as an examination of the legislative history, "would seem to preclude an agreement executed two months later and not in being on September 1, 1977." Id. at 920. The Sixth Circuit held that the EEOC interpretation of Section 2(b) was entitled at the very least to consideration and weight by the courts and that the informal oral opinion of Assistant

Secretary Elisburg, "given without any opportunity for [Anness's] representative to be heard and rendered without full and deliberate consideration and also without the opportunity for adverse comments, arguments or submissions" should not be given equivalent weight. Id. at 921.

Finally, the Sixth Circuit concluded that USWA was not immune from liability under Section 7(e) of ADEA, 29 U.S.C. Section 626(e), which incorporates 29 U.S.C. Section 259 of the 1947 Portal-to-Portal Act. Noting that the plain language of said section "indicates that it is applicable only if the approval or interpretation of the law by the appropriate agency [is] in writing," id. at 921, the Sixth Circuit held (id. at 922):

> In this case, the Steelworkers relied only upon an oral declaration by an agency official; there was no formal ruling or approval issue[d], and there was no written regulation, order, ruling, approval

> or interpretation upon which the union could act in reliance prior to the filing of the Anness charge, nor even prior to the filing of this litigation. Obviously, there was no basis for the application of 29 U.S.C. Section 259, at the time [USWA] decided to retire Anness involuntarily contrary to the provisions of the 1978 ADEA amendment as this court has now interpreted it. [USWA] cannot claim immunity under this statutory provision.

I

THE COLLECTIVE BARGAINING AGREEMENT SIGNED ON NOVEMBER 1, 1977, AND MADE RETROACTIVE TO AUGUST 1, 1977, WAS NOT A CONTRACT "IN EFFECT ON SEPTEMBER 1, 1977," WITHIN THE MEANING OF SECTION 2(b) OF THE 1978 AMENDMENTS TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT; THUS, THE USWA'S INVOLUNTARY RETIREMENT OF THE PETITIONERS AT AGE 65 WAS IN VIOLATION OF THE LAW

There is no factual dispute that the 1974 SOC-USWA collective bargaining agreement expired on August 1, 1977; that the new Agreement under which the plaintiffs' employment was terminated had not been negotiated, agreed upon, or executed prior to September 1, 1977; that nego-

tiations for the new Agreement concluded on or about October 12, 1977; and that, in fact, the Agreement was not formally signed until November 1, 1977. In U.S.E.E.O.C. v. County of Calumet, 686 F. 2d 1249, 1257 (7th Cir. 1982), the Seventh Circuit stated that Section 2(b) exemptions to the effective date of the ADEA were only available "for plans negotiated and in effect" before September 1, 1977.

Nothing could be more clearly and simply expressed than the Section 2(b) declaration that the 1978 amendments prohibiting involuntary retirement of individuals under age 70 "shall take effect upon the termination of such agreement or on January 1, 1980, whichever occurs first" (emphasis added). The scope of the exemption is stated in terms which are neither ambiguous nor equivo-

cal. Undeniably, the 1974 agreement terminated on August 1, 1977. That the parties continued to live by the terms of the 1974 agreement between August 1 and November 1, 1977, should in no way obfuscate the fact that there was no new negotiated agreement in effect on September 1, 1977. Thus, as of April 6, 1978, USWA was compelled to comply with the Section 4(b)(2) amendment which forbade involuntary retirement of individuals under 70 years of age. In the alternative, even assuming arguendo that the terms and conditions of the 1974 Agreement were carried over until November 1, 1977, as found by the trial court, that agreement expired on November 1, 1977, and USWA was still compelled to comply with Section 4(1)(2) because Section 2(b) of P. L. No. 95-256 mandated that the effective date of the amendment for

agreements in effect on September 1, 1977, was "upon termination of such agreement or on January 1, 1980, whichever occurs first" (emphasis added). Since logic dictates that a collective bargaining agreement must be deemed to expire at some time, if the Court concludes (as did the Sixth Circuit and the EEOC) that the 1974 Agreement expired on August 1, 1977, then it was not "in effect" on September 1, 1977. Alternatively, if the agreement terminated on November 1, 1977, then USWA was still required to comply with the extended age provisions. Clearly, neither the district court nor the Seventh Circuit addressed the point at which the 1974 agreement could be deemed to have expired.

Whether a collective bargaining agreement signed and executed on November

1, 1977, though made retroactive to August 1, 1977, is a contract "in effect on September 1, 1977" for purposes of the 1978 amendments to the ADEA is a question of statutory construction. As "in any case concerning the interpretation of a statute, 'the starting point' must be language of the statute itself." Lewis v. United States, 445 U.S. 55, 60 (1980), citing Rieter v. Sonotone Corp., 442 U.S. 330, 337 (1979); and Touche Ross and Co. v. Redington, 442 U.S. 560, 568 (1979). Moreover, in construing that language, the words used must be given their ordinary meaning in the absence of persuasive reasons to the contrary. Perrin v. United States, 444 U.S. 37, 42 (1979); Burns v. Alcala, 420 U.S. 575, 580 (1975).

The words "in effect" in Section 2(b) of the 1978 Amendments denote

currently operative or operating in the present. Ballentine's Law Dictionary 616 (3rd ed. 1969) defines "in effect" as "in force; in operation; effective." The new contract in this case was not negotiated, agreed to, or executed until November 1, 1977. According to the common sense meaning of the statutory language, it cannot have been "in effect on September 1, 1977." Thus, by its terms, the text of Section 2(b) does not encompass such an agreement. Common sense also dictates that to accept the lower courts' views would render the Section 2(b) amendment meaningless because collective bargaining agreements containing provisions for retroactive effectiveness could always avoid the application of intervening legislation.

This common sense interpretation of the 1978 amendments is made clear by a

brief review of the legislative history. The language used by the Congress makes plain its intent to exempt from the Act's ban on age discrimination only those agreements which had been negotiated and were in effect on or before September 1, 1977. This purpose was expressly explained by the Joint Committee of the Unites States House of Representatives and Senate as follows:

> The conferees agree that the purpose of the amendment to section 4(f)(2) is to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age.
>
> In McMann v. United Airlines, 98 S. Ct. 244 (1977), the Supreme Court held to the contrary, reversing a decision reached by the Fourth Circuit Court of Appeals, 542 F. 2d 217 (1976). The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section

> 4(f)(2) by virtue of the fact that they antedate the act or these amendments.

1978 U.S. Code Cong. and Ad. News 528, 529.

Nowhere in the legislative history is there any suggestion that Congress intended the Section 2(b) exemption to apply to collective bargaining agreements negotiated and signed after September 1, 1977, although made retroactive by agreement to a prior date. The Seventh Circuit's decision, relying upon and citing legislative policy behind the various extended effective dates of the amendment "to recognize and provide maximum deference" to negotiated contracts consistent with Congress's desire to end mandatory retirement of workers under age 70 and upon Representative Hawkins's statement that "It should be the policy of Congress . . . not to open up

collective bargaining agreements in effect if that is not absolutely necessary," Graczyk, Howard, Calacci, and Picard v. United Steelworkers of America, Nos. 83-2968, 83-3044, slip op. at 12 (7th Cir. May 17, 1985) (emphasis added), fails to recognize that these policy statements, when applied to the facts of this case, weight in favor of the Petitioners; i.e, the 1974 Agreement expired on August 1, 1977, the 1974 USWA-SOC Agreement was no longer in effect on September 1, 1977, and to be consistent with Congress's desire to end mandatory retirement of workers under age 70 would be to order that USWA comply with the ADEA as amended. Both the language and the legislative history of Section 2(b), as explained by the Joint Committee, supra, mandate that the Collective Bargaining Agreement in this case was not

in effect on September 1, 1977.

Further, it is a cardinal rule of judicial construction that exemptions from remedial laws are to be narrowly construed. A. H. Philips, Inc. v. Walling, 324 U.S. 490 (1945). The expansive construction urged by USWA and accepted by the district court and the Seventh Circuit, i.e., that a November 1, 1977, contract should be treated as though it had been negotiated and executed prior to September 1, 1977, is plainly inconsistent with this fundamental principal. Moreover, to allow parties to circumvent the law merely by making agreements retroactive would contravene public policy.

Finally, it is well established that "regulations promulgated by the enforcing agency are entitled to great deference." Griggs v. Duke Power Co.,

401 U.S. 424, 433-34 (1971). See also Brennan v. Owensboro-Davies County Hospital, 523 F. 2d 1013, 1028 and n. 13 (6th Cir. 1975), cert. denied sub nom. Owensboro-Davies County Hospital v. Usery, 425 U.S. 973 (1976); Udall v. Tallman, 380 U.S. 1, 16 (1965), reh'g. denied, 380 U.S. 989 (1965). The district court manifested its hostility toward the EEOC when it stated that "The EEOC . . . follows the affirmative policy of searching for every possible discrimination under its jurisdiction, in its capacity of enforcing remedial statutes."

The district court incorrectly concluded that the interpretations of the Section 2(b) amendment by the DOL and EEOC were in conflict. The Seventh Circuit repeated that erroneous statement in its decision. Clearly, the DOL and the EEOC concluded that the Section 2(b)

exemption applies only to contracts negotiated and signed prior to September 1, 1977. This view was published by the EEOC in 44 Fed. Reg. 68858, on November 30, 1979, prior to the date on which Graczyk instituted his suit, as the proposed joint official interpretation of the DOL and the EEOC addressed to the status, under the 1978 amended ADEA, of agreements signed subsequent to September 1, 1977, but made retroactive to the expiration of the previous agreement. The published proposed interpretation reads, in pertinent part:

> Section 1625.9 Prohibition of Involuntary Retirement.
>
> (d)(3) Where a collective bargaining agreement expired prior to September 1, 1977 and a new agreement was signed subsequent to that date effective retroactively to the expiration date of the previous agreement, the exemption does not apply.

44 Fed. Reg. at 68862 (1979). In intro-

ducing the proposed interpretation and regulation, the EEOC emphasized:

> In addition, the Commission wishes to note the addition of Section 1625.9 entitled "Prohibition of Involuntary Retirement." This interpretation was drafted by the Department of Labor in response to the statutory changes made to the Act in 1978.

Id. at 68858 (emphasis added). The proposed interpretation of the EEOC was officially adopted on September 29, 1981. (See 46 Fed. Reg. 47726, 47728 (1981), codified at 29 C.F.R. Section 1625.9(d)(3) (1984).) Thus, determinatively, the DOL and the EEOC, the agency which had enforcement authority prior to July 1, 1979, and the agency which had enforcement authority subsequent to that date, were in complete agreement with respect to the primary issue in this case.

The only conceivable conflict between the DOL and the EEOC arises as a result of the informal oral opinion

rendered by one DOL official, Donald Elisburg, on July 21, 1978, not any written pronouncement by the Department itself. Moreover and importantly, the district court erred when it gave deference to Elisburg's oral opinion rather than the joint official interpretation of the DOL and the EEOC with respect to the 1978 ADEA amendments. There can be no doubt that Elisburg's opinion was verbal and not in writing as required by 29 U.S.C. Section 259 (1975). The scope of the reliance defense is stated in Section 7(e)(1) of the ADEA, 29 U.S.C. 626(e)(1), which provides that the defendant plead and prove such reliance was in good faith conformity with a written regulation, order, ruling, or the like of the agency charged with administering the Act. The courts have repeatedly held that such a provision is the only basis for the

reliance defense in cases such as the one sub judice. See Usery v. Godwin Hardware, Inc., 79 Lab. Cas. (CCH) par. 33,414 at p. 47,497 (W. D. Mich. 1976).

It is significant that USWA did not request or receive from the DOL prior to the July 1, 1979, transfer of authority or from the EEOC subsequent to said transfer a written "regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy" upholding its right to involuntary retire employees after the enactment of the 1978 amendments to the Act. Significantly, both the DOL and the EEOC were of a contrary view. Indeed, it was only after Graczyk and Anness filed their respective federal actions that Elisburg wrote his October 1980 letter of recollection to the EEOC. Conclusively, the courts below erred when they stated that there was a

conflict between the enforcement agencies which entitled the courts to choose between two purportedly conflicting interpretations.

In the instant case, the USWA, in terminating the employment of the plaintiffs, knowingly evaded the federal law prohibiting employers from forcing the retirement of employees between the ages of 40 and 70. It elected to maintain in effect a policy known to it to be in conflict with statutory requirements. Graczyk, Howard, Calacci, and Picard were discharged by USWA without any regard for USWA's statutory obligations to refrain from such age discrimination. The Petitioners respectfully submit that the actions of USWA in terminating their employment constituted a knowing and willful violation of the Age Discrimination in Employment Act of 1967, as

amended.

Accordingly, it is respectfully submitted that the district court and the Seventh Circuit were in error when they found that the 1977 USWA-SOC collective bargaining agreement was "in effect" on September 1, 1977. The plain language of Section 2(b), the legislative history, the joint interpretations of that language by the Department of Labor and the EEOC, and the interpretation of that language by the Sixth Circuit in Anness, strongly support the Petitioners' contentions and militate against the reasoning and decisions of the courts below.

II

THE ADDITIONAL CONSENTING PLAINTIFFS, HOWARD, CALACCI, AND PICARD, ARE NOT TIME-BARRED FROM MAINTAINING THEIR CAUSE OF ACTION WHERE GRACZYK TIMELY FILED HIS CHARGE WITH THE EEOC AND TIMELY FILED HIS COMPLAINT

The Seventh Circuit construed the

district court's order of March 14, 1983, denying Graczyk's motion for leave to add Count II (additional plaintiffs) without prejudice to mean that the district court had actually dismissed the additional consenting plaintiffs with prejudice, most likely because the district court had orally expressed its view that the additional plaintiffs were probably time-barred. However, the Seventh Circuit upheld the dismissal of the additional plaintiffs on the basis that its decision with respect to the primary issue would necessitate a finding that the additional plaintiffs failed to state a claim for relief. Because the Seventh Circuit did not address the time bar issue presented to it by Howard, Calacci, and Picard and because the granting of this Petition for Writ of Certiorari would again raise this issue for consid-

eration, the Petitioners herein argue that: (1) because Graczyk complied with the notice requirement of the ADEA, Howard, Calacci, and Picard were not required to do so; thus, there is no jurisdictional bar to their inclusion in Graczyk's suit; (2) the ADEA provides no deadline by which potential plaintiffs must file consents to opt into a suit; (3) the additional consenting plaintiffs were not time-barred from complying with the ADEA notice requirement on the date Graczyk filed his charge; (4) this Court may adjudicate purportedly time-barred claims which arise out of a policy that continues to discriminate within the jurisdictional period; (5) the statute of limitations presents no bar to the actions of the additional plaintiffs; and (6) general equitable principles mandate that the claims of Howard, Calacci, and

Picard be heard by the Court.

A. Because Graczyk Timely Filed His Discrimination Charge With the EEOC and Thereby Satisfied the Jurisdictional Requirement of the ADEA, There Is No Need for the Additional Consenting Plaintiffs to Have Done So.

It is clear that, as a predicate to filing suit under the ADEA, there must be a charge of unlawful discrimination timely filed with the EEOC. 29 U.S.C. Section 626(d) (1982). Graczyk complied with that requirement. It is equally clear that a plaintiff who has satisfied the aforementioned jurisdiction requirement may represent other plaintiffs who have consented to join the suit but who have not filed notice with the EEOC. Bean v. Crocker National Bank, 600 F. 2d 754 (9th Cir. 1979); Schuster v. Federated Department Stores, Inc., 508 F. Supp.

118 (N.D. Ga. 1980); Franci v. Avco Corp., 460 F. Supp. 389 (D. Conn. 1978); Locascio v. Teletype Corp., 74 F.R.D. 108 (N.D. Ill. 1977). In fact, in Bean, 600 F. 2d 754, the court stated:

> The ADEA's broad remedial purposes of prohibiting arbitrary age discrimination and of promoting the employment of older persons based on their ability rather than age are best served by an interpretation of 29 U.S.C. Section 216(b) that permits similarly situated complainants to join in an action as named parties so long as a named plaintiff has complied with the notice requirements of 29 U.S.C. Section 626(d).

Bean, 600 F. 2d at 759.

Although Bean, Franci, and Locascio were class action suits, the rationale incorporate therein has been extended to non-class suits. Thus, in Wheeler v. American Home Products Corp., 582 F. 2d 891, 897 (5th Cir. 1977), the court stated:

> It had earlier been pointed out in a Title VII class action: "It

> would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC." Oatis v. Crown Zellerbach Corp., 398 F. 2d 496, 498 (5th Cir. 1968). It was there said to be better to permit one "aggrieved person," who had made a charge to EEOC, to bring an action for persons similarly situated. While in Oatis the action was a class action, the same reasoning would apply wherever similarly situated persons intervene in an action and one or more of the original plaintiffs had satisfied the jurisdictional requisites.

Accord, Crawford v. United States Steel Corp., 660 F. 2d 663, 665 (5th Cir. 1981); Shuster v. Federated Department Stores, Inc., 508 F. Supp. 118, 120-21 (N.D. Ga. 1980).

The legislative amendment to Section 626(d) adds further weight to the contention of Howard, Calacci, and Picard that it is unnecessary for each individual plaintiff to file a timely charge with the EEOC before bringing a civil action. Prior to the amendment, effec-

tive April 6, 1978, Section 626(d) provided, in pertinent part (emphasis added):

> No civil action may be commenced by any individual under this section unless the individual has given the Secretary not less than sixty days notice of intent to file such action. Such notice shall be filed . . .

The present statute, as modified by the 1978 Amendments, reads as follows:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary.

Significantly and determinatively, Congress eliminated the literal requirement that each plaintiff in the civil action file a timely notice with the appropriate agency. In Shuster v. Federated Department Stores, Inc., 508 F. Supp. 118 (N.D. Ga. 1980), the court, comparing the previously-quoted language of the old and new statutes with reference to a non-

filing plaintiff who wanted to join in a suit brought by a plaintiff who had timely filed, ruled in favor of the plaintiff. The court stated:

> Because the court does not believe that Congress would perform a useless act, it finds additional support for [the plaintiff's] position. Also, a ruling in favor of [the plaintiff] is in harmony with Congress' express intent in enacting the amendments to the act: "The purpose of these amendments is to make it more likely that courts will reach the merits of the cases of aggrieved individuals and do so more expeditiously." S. Rep. No. 493, 95th Cong., 2d Sess., 12, reprinted in [1978] U.S. Cong. and Ad. News, 504, 515.

Shuster, 508 F. Supp. at 121.

The only courts which have held that individual compliance with the notice provisions of the ADEA is a jurisdictional requirement for all consenting plaintiffs did so before enactment of the 1978 amendments to the ADEA. See, e.g., Oshiro v. Pan American World Airways, Inc., 378 F. Supp. 80 (D.

Hawaii 1974); Price v. Maryland Casualty Co., 62 F.R.D. 614 (S.D. Miss. 1972).

Clearly, because Graczyk satisfied the jurisdictional requirement of the ADEA, Howard, Calacci, and Picard, all similarly situated, were entitled to join in Graczyk's suit by the filing of their consents. On June 12, 1981, Howard, Calacci, and Picard signed consents. On June 15, 1981, the trial court added them as parties in Graczyk's suit. The consents were filed on July 6, 1981. Howard, Calacci, and Picard did all they were required to do in order to opt into Graczyk's suit. Accordingly, the trial court erred on March 14, 1983, when it orally stated they were time-barred, denied them leave to file Count II of their Amended Complaint, and dismissed Count II without prejudice (deemed "with prejudice" by the Seventh Circuit).

B. The ADEA Provides No Deadline by Which Potential Plaintiffs Must File Consents to Opt Into a Suit.

Under the ADEA, 29 U.S.C. Section 626(b), which incorporates procedural remedies of the Fair Labor Standards Act, 29 U.S.C. Section 216(b), a plaintiff can bring a representative action on behalf of all similarly situated employees who consent in writing. That provision specifies no time limitation for opting into a lawsuit. See Monroe v. United Air Lines, Inc., 94 F.R.D. 304, 305 (N.D. Ill. 1982); Joyce v. Sandia Laboratories, 23 Empl. Prac. Dec. (CCH) par. 31,043A at p. 16,407 (N.D. Cal. 1980).

In Carter v. Marshall, 457 F. Supp. 38, 41 (D.C. 1978), the court, when confronted with a motion to dismiss a plaintiff who had not filed a consent to opt in, allowed her five days to file her

consent. In Wagner v. Loew's Theatres, Inc., 76 F.R.D. 23, 24 (M.D. N.C. 1977), the court stated that the "opportunity to 'opt-in' continues at least until a reasonable time prior to the trial of the case." A few courts have set cutoff dates for the appearance of additional plaintiffs. See, e.g., Locascio v. Teletype Corp., 74 F.R.D. 108, 112 (N.D. Ill. 1977): "Defendant is entitled, at some point before trial, to a final list of the plaintiffs" (emphasis added); Roshto v. Chrysler Corp., 67 F.R.D. 28 (E.D. La. 1975): consents must be filed at least 30 days prior to trial; Bishop v. Jelleff Assocs., 4 Fair Empl. Prac. Cas. (BNA) 1262 (D.C. 1972): "reasonable time," i.e., 45 days from date of court order.

Howard, Calacci, and Picard signed consents to join in Graczyk's federal

lawsuit on June 12, 1981. The trial court added them as additional parties on June 15, 1981. Clearly, under the ADEA there is no cutoff date for the filing of consents. Additionally, because Howard, Calacci, and Picard acted expeditiously in filing consents (1) within a "reasonable time" and (2) well before trial--the only two measures of time any courts have articulated as a standard by which to judge when to cut off a plaintiff's right to opt into a suit--Howard, Calacci, and Picard are not time-barred from joining Graczyk's cause of action.

C. The Additional Consenting Plaintiffs Were Not Time-Barred From Complying With the ADEA Requirement on the Date Graczyk Filed His Charge.

Assuming arguendo that the Court should find that Graczyk cannot represent Howard, Calacci, and Picard unless they

could have timely complied with the notice requirement of Section 626(d) as of the date Graczyk filed his discrimination charge with the EEOC, nevertheless, none of the three consenting plaintiffs was time-barred on that date, i.e., December 12, 1979. Section 626(d)(2) allows an aggrieved individual who is a resident of a "deferral" state (a state which has a law prohibiting discrimination in employment because of age and establishing or authorizing a state authority to grant or seek relief from such discriminatory practice) 300 days in which to file a charge. Conclusively, Howard and Picard are residents of Indiana and Calacci is a resident of Pennsylvania. Both Indiana and Pennsylvania are deferral states. See 43 PA. CONS. STAT. Sec. 951 et seq. (1964 and Supp. 1985); IND. CODE, Sec. 22-9-2-1 et

seq (1981).

The critical 300-day period, working backward from December 12, 1979, extends to February 16, 1979. Determinatively, Howard and Picard were involuntarily retired on April 1, 1979, and Calacci was involuntarily retired on June 1, 1979--all well within the 300-day limitation period. Even using the date of notification of their impending retirements (March 13, 1979), at least Calacci and Picard were within the 300-day period. Therefore, because the additional plaintiffs could have timely complied with the ADEA notice requirement as of the date Graczyk filed his EEOC charge, they are not time-barred and are entitled to be represented by Graczyk in his action.

D. This Court May Adjudicate Purportedly Time-Barred Claims Which Arise out of a Policy That Continues to Discriminate Within the Jurisdictional Period.

Assuming arguendo consenting plaintiffs could opt in only if they were not time-barred and it should be found that one or more of the consenting plaintiffs fell outside the limits of the 300-day jurisdictional notice period marked by the date Graczyk filed his charge, their claims may still be adjudicated since they arise out of a policy which continued to discriminate against them within the 300-day period. Bartmess v. Drewrys USA, Inc., 444 F. 2d 1186 (7th Cir. 1971), cert. denied, 404 U.S. 939 (1971). In Bartmess a retirement plan which discriminated on the basis of sex was challenged. The district court dismissed the complaint, holding that the plaintiffs had failed to file a charge of

discrimination within the applicable time period. The Seventh Circuit reversed, maintaining that such failure cannot constitute a bar to recovery when a continuing practice of discrimination is being challenged rather than a single isolated discriminatory act. Id. at 1188. The viability of Bartmess has been repeatedly upheld. See, e.g., Boyd v. Madison County Mutual Insurance Co., 653 F. 2d 1173, 1176 (7th Cir. 1981), cert. denied, 454 U.S. 1146 (1982); and Stewart v. CPC International, Inc., 679 F. 2d 117, 121 (7th Cir. 1982).

In the instant case, it is undeniable that from April 6, 1978, until January 1, 1980, USWA maintained a policy of forcing workers, including Howard, Calacci, and Picard, into retirement upon their reaching 65 years of age. A policy such as this constitutes by nature

continuing discrimination. Therefore, under the rule established by Bartmess and its progeny, this Court should allow the adjudication of the claims of the additional consenting plaintiffs.

E. The Statute of Limitations Presents No Bar to the Actions of the Additional Consenting Plaintiffs.

Because Graczyk's complaint was timely filed within the two-year statute of limitations, the joinder of Howard, Calacci, and Picard relates back to the filing of Graczyk's complaint and thus is not time-barred. Fed. R. Civ. P. 15(c). See also Paskuly v. Marshall Field & Co., 494 F. Supp. 687 (N.D. Ill. 1980); DeMalherbe v. International Union of Elevator Constructors, 449 F. Supp. 1335 (D.C. Cal. 1978); and Wong v. Calvin, 87 F.R.D. 145 (D.C. Fla. 1980).

Assuming arguendo that this Court

should find that the joinder of Howard, Calacci, and Picard does not relate back to the filing of Graczyk's complaint, their actions are nevertheless not barred by the statute of limitations. The statute of limitations for willful violation of the ADEA is three years. 29 U.S.C. Section 255(a).

The Seventh Circuit, in Syvock v. Milwaukee Boiler Manufacturing Co., Inc., 665 F. 2d 149 (7th Cir. 1981), has applied a "knowing" standard for willfulness. In Syvock the court held that, in order to prove willfulness under 29 U.S.C. Section 626(b), the liquidated damages provision, a plaintiff "must show that defendant's actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA." Id. at 156. Under the Syvock standard, the plaintiff must

only show: "(1) that the employer knew or reasonably should have known what the requirements of the ADEA are and (2) that the employer knew or reasonably should have known that his actions toward the plaintiff were inconsistent with those requirements." Id. at 156, n. 10. In Coleman v. Jiffy June Farms, Inc., 458 F. 2d 1139 (5th Cir. 1972), after noting that the entire legislative history of the Fair Labor Standards Act ("FLSA") pointed toward a liberalizing intention on the part of Congress with respect to an employer's decision regarding possible applicability of the FLSA, the Court articulated a succint test for willfulness: "Did the employer know the FLSA was in the picture?" Id. at 1142.

USWA was clearly aware of the 1978 ADEA amendment which increased the scope of coverage of the Act to employees

between 65 and 70 years of age. In fact, USWA arranged a meeting with various DOL representatives in order to solicit an opinion that it could use to justify its non-compliance with the Act. Clearly, USWA meets the "knowing" standard used by the Seventh Circuit to determine willfulness under the ADEA and more than meets the test used by the Fifth Circuit in Jiffy June. Accordingly, because the employment of Howard, Calacci, and Picard was involuntarily terminated in mid-1979, their joinder was well within the applicable three-year statute of limitations for willful violations of ADEA.

F. General Equitable Principles Mandate That the Claims of the Additional Consenting Plaintiffs Be Allowed to Be Heard.

1. USWA is not unduly prejudiced by the inclusion of the additional plaintiffs in Graczyk's suit.

Immediately after the district

court added Howard, Calacci, and Picard to Graczyk's suit, USWA began its discovery. Depositions were taken of all three additional plaintiffs on August 11, 1981, and all documents requested of them by USWA were produced at that time. Also on August 11, 1981, USWA moved to close the period for joinder of additional plaintiffs other than Howard, Calacci, and Picard, admitting that their discovery was nearing completion and stating that anyone wishing to join the suit had had "ample opportunity to do so."

Furthermore, the legal issue with respect to the additional plaintiffs is the same as the issue in Graczyk's case. The claims of the additional consenting plaintiffs are identical to the claim of Graczyk, differing only in their dates of discharge. Clearly, USWA cannot claim lack of notice, delay, undue

burden, or undue prejudice occasioned by the adding of the additional plaintiffs.

2. The additional consenting plaintiffs made good faith efforts to pursue their claims.

In early July 1980, Howard, Calacci, and Picard retained the attorney who represented Frank Anness against USWA in Ohio to assist them in pursuing their claims. The plaintiffs relied on Anness's attorney and assumed that their interests were being protected and their rights properly and timely pursued. In May of 1981, almost one year later, Howard, Calacci, and Picard discovered that said attorney had not joined them as parties to Anness's federal action and that the EEOC had not taken any action on their behalf. Howard, Calacci, and Picard immediately contacted Graczyk's attorney and requested that they be

joined as parties in Graczyk's suit. By mid-June 1981 they had signed the necessary consents, and the district court added them as parties to Graczyk's suit.

Under the aforesaid circumstances, and bearing in mind that there is no prejudice to USWA, it would constitute an injustice to deny the additional plaintiffs their statutory rights and remedies merely because their prior attorney, upon whom they relied in good faith, did not pursue their claims.

3. The ADEA is a remedial statute which should be liberally construed.

In Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979), Mr. Justice Blackmun noted that the ADEA is "a remedial statute that is to be liberally construed" and suggested that it should be read in such a manner as to "give full recogni-

tion to that remedial character." Id. at 765-66. Further, in Zipes v. TWA, 455 U.S. 385 (1982), reh'g. denied sub nom. Independent Federation of Flight Attendants v. Trans World Airlines, Inc., 456 U.S. 940 (1982), this Court held that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling."

In Abbott v. Moore Business Forms, Inc., 439 F. Supp. 643, 646 (N.H. 1977), the court noted that "factors suggesting the appropriateness of tolling . . . include . . . diligence in pursuing one's rights . . . and absence of prejudice to the defendant."

Certainly, Howard, Calacci, and Picard are prime candidates for the

equitable jurisdiction of this Court. Several of the Abbott factors are present in their case. The real prejudice will be to the three additional plaintiffs should they be foreclosed from opting into Graczyk's suit since they will be forever barred from asserting their claims.

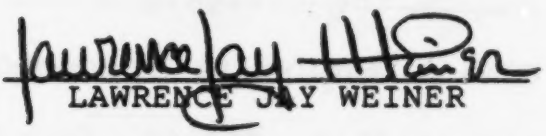
It is respectfully submitted that for the foregoing reasons, which were before the district court when it denied USWA's Motion to Reconsider Granting of Plaintiff's Motion to Add Additional Plaintiffs or, in the Alternative, to Dismiss Claims of Additional Plaintiffs on January 28, 1983, and gave the additional plaintiffs one week in which to file their amended complaint, the district court erred when it denied Graczyk's Motion for Leave to File Count II of his Amended Complaint instanter on

March 14, 1983, stating orally its belief that the additional plaintiffs were time-barred.

CONCLUSION

WHEREFORE, the Petitioners respectfully pray that this Court grant their Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,



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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 83-2968

ANTHONY J. GRACZYK,
Plaintiff-Appellant,
v.
UNITED STEELWORKERS OF AMERICA,
Defendant-Appellee.

No. 83-3044

JOHN HOWARD, PETER CALACCI,
and HAROLD PICARD,
Plaintiffs-Appellants,
v.
UNITED STEELWORKERS OF AMERICA,
Defendant-Appellee.

Appeals from the United States
District Court for the Northern
District of Illinois, Eastern Division
No. 80 C 2909--Thomas R. McMillen, Judge.

ARGUED OCTOBER 3, 1984--DECIDED MAY 17, 1985*

Before ESCHBACH, COFFEY, and FLAUM, Circuit Judges

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* Pursuant to Circuit Rule 16(e), this opinion has been circulated among all judges of this court in regular active service, because it creates a conflict

ESCHBACH, Circuit Judge. The primary question presented by these consolidated appeals is whether the district court erred in concluding that the 1977 collective-bargaining agreement at issue was "in effect" on September 1, 1977, for the purposes of Section 2(b) of P.L. No. 95-256, which amended the Age Discrimination in Employment Act of 1967, 29 U.S.C. Sections 621-634 ("ADEA"), and, therefore, that the agreement was exempted from the application of those amendments at the time of appellants' retirement. For the reasons developed below, we have determined that the district court's interpretation of both Section 2(b) and the 1977 labor agreement was

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with the decision of the United States Court of Appeals for the Sixth Circuit in Anness v. United Steelworkers of America, 707 F.2d 917 (6th Cir. 1983). See infra note 12. No judge favored rehearing en banc on this issue.

correct.

I

A. Collective-Bargaining Agreements

The United Steelworkers of America ("USWA") is a labor organization that represents workers in the steel and related industries. During the period under consideration, the union employed approximately 800 individuals as "staff representatives," who would act as agents of the International for the over 5,000 local unions. The USWA staff representatives themselves were represented by a labor organization, the Staffman's Organizing Committee ("SOC").

Appellant Graczyk was employed as a staff representative by the USWA from July 1943 to October 1, 1979. The terms and conditions of his employment were determined by collective-bargaining

agreements negotiated and signed between the SOC and the USWA. The six agreements--in 1966, 1968, 1970, 1971, 1974, and 1977--under which Graczyk was employed provided for mandatory retirement at age 65. [1]

On May 9, 1977, the SOC notified the USWA that the SOC wished to terminate

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[1] The mandatory retirement provision was part of a policy of the International's executive board adopted on January 26, 1966, and made effective as of July 1, 1966. It was incorporated by reference into the 1977 agreement. The 1966 policy provided for (1) optional retirement with full pension at age 60 for employees with 20 years of service; (2) optional retirement at age 55 with a reduced pension for employees with 10 years of service; (3) the right of the pension trustees, with the approval of the International Executive Board, to retire any employee who attained age 62 and had accumulated 20 years of service credits; and (4) mandatory retirement for all employees at age 65.

In March 1970, the provision granting the pension trustees the right to retire any employee with 20 years of service credit at age 62 was deleted.

the agreement dated August 1 1974. Article XI of the 1974 agreement provided that the contract would:

> continue in effect until such time as the [USWA] has completed negotiations and reached new agreements with the aluminum industry, nonferrous and basic steel industry, in 1977. Not later than 30 days thereafter, the parties will make arrangements to meet and negotiate a new Agreement. This Agreement shall continue in effect until either party notifies the other of its desire to terminate, or a new Agreement is reached by the parties. It is further understood that the effective date of any Agreement reached by the parties subsequent to July 31, 1977, shall be effective August 1, 1977, unless otherwise mutually agreed.

(emphasis in original)

The negotiations between the USWA and the SOC began in July 1977, and were completed on or about October 12, 1977; the new contract was formally signed on November 1, 1977, and provided that:

> This Agreement, dated as of August 1, 1977, is between the [USWA] and the [SOC]. Except as otherwise specified herein, the provisions of

> this Agreement shall be effective August 1, 1977. This Agreement supersedes and replaces the Agreement between the parties dated August 1, 1974.

When the 1977 agreement was signed, the mandatory retirement policy was consistent with the requirements of the ADEA. In United Air Lines, Inc. v. McMann, 434 U.S. 192, 98 S. Ct. 444 (1977), the Supreme Court held that early retirement of an employee pursuant to a mandatory retirement provision of a bona-fide retirement plan was not prohibited by the ADEA. However, on April 6, 1978, Congress overruled McMann by enacting P.L. No. 95-256, 92 Stat. 189 ("1978 amendments"), which amended ADEA Section 12, 29 U.S.C. Section 631, to provide protection for individuals "who are at least 40 years of age but less than 70 years of age." This amendment to Section 12 became effective on January 1, 1979.

In addition, Section 4(f)(2), 29 U.S.C. Section 623(f)(2), of the Act was amended to provide that no "seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by [29 U.S.C. Section 631(a)] because of the age of such individual." [2]

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[2] Section 4(f)(2), 29 U.S.C. Section 623(f)(2), as amended, provides:

> It shall not be unlawful for an employer, employment agency, or labor organization--
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> . . . .
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual.

Section 2(b) of P.L. No. 95-256 set out the effective date of the amendment to Section 4(f)(2) of the Act:

> The amendment [to 29 U.S.C. Section 623(f)(2)] shall take effect on [April 6, 1978], except that, in the case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977, which was entered into by a labor organization . . ., and which would otherwise be prohibited by [29 U.S.C. Section 631], the amendment [to 29 U.S.C. Section 623(f)(2)] shall take effect upon the termination of such agreement or on January 1, 1980, whichever occurs first.

The USWA sought an opinion from the Department of Labor ("DOL") [3] as to the effect of the 1978 amendments. On July 21, 1978, representatives of the USWA met with certain DOL officials, including Donald Elisburg, the DOL's Assistant

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[3] The DOL originally had authority for the implementation and interpretation of the ADEA. Pursuant to a 1978 reorganization plan, that authority was transferred to the EEOC on July 1, 1979. See 43 Fed. Reg. 19,807 (1978).

Secretary for Employment Standards. At the meeting, the DOL representatives provided an oral opinion that the USWA's 1977 collective-bargaining Agreement was "in effect" on September 1, 1977, for the purposes of Section 2(b) of the 1978 amendments. This conclusion was not memorialized in any document. Assistant Secretary Elisburg did, however, in responding to a request from Leroy D. Clark, General Counsel of the EEOC, provide in a letter dated October 20, 1980, an account of the July 1978 meeting:

> To the best of my recollection we were unanimous in stating that such an agreement would be considered by us to be "in effect on September 1, 1977" if the purpose of the retroactivity was not a subterfuge to get around the purposes of the Act and to avoid application of the ADEA amendments as of January 1, 1979. As we were informed by the [USWA's] counsel that such retroactivity was completely consistent with past practice, that the retroactivity feature of the 1977 contract was agreed to by the parties in 1974, and that the

> retroactivity became effective when the current 1977 agreement was signed, which was well before the adoption of the ADEA amendments, it seemed clear to us that the retroactivity was not a bad faith effort by the [USWA] to get around the new age 70 mandatory retirement age.

(emphasis in original)

On July 5, 1979, Graczyk was informed by the USWA that, because he would reach 65 years of age on September 5, 1979, he would be required to retire no later than October 1, 1979, pursuant to the compulsory retirement plan. Graczyk filed a grievance on July 20, 1979, contesting the involuntary retirement and subsequently exhausted the administrative procedures and remedies provided by the USWA. On October 1, 1979, he was retired.

Graczyk then filed a charge with the EEOC on December 12, 1979, in which he maintained that the USWA's termination of his employment violated his rights

under the 1978 amendments. The EEOC at first authorized the initiation of a lawsuit by that agency against the USWA for a violation of the ADEA. This position was consistent with that taken by the EEOC in its interpretation of the 1978 amendments:

> Where a collective bargaining agreement expired prior to September 1, 1977, and a new agreement was signed subsequent to that date effective retroactively to the expiration date of the previous agreement, the exemption [of Section 2(b)] does not apply. The expressed congressional intent was to exempt only those agreements which had been "negotiated" before September 1, 1977.

It should be noted that this regulation was not even proposed until November 1979 (after all four plaintiffs had been retired), and was not officially adopted until September 29, 1981 (1428 days after the 1977 agreement was formally signed and 637 days after January 1, 1980, which was the date that the Section 2(b)

exemption expired). [4]

The decision to proceed with litigation was made before the EEOC was informed of the July 1978 meeting between representatives of the DOL and the USWA. When apprised of the meeting, the EEOC determined that a suit by the government would be inappropriate and, therefore, withdrew authorization for the General Counsel to sue. Graczyk instituted this action on June 9, 1980.

B. Additional Plaintiffs

Three other USWA staff representatives who were forced to retire in 1979 when they reached age 65--Peter Calacci, John Howard, and Harold Picard ("addi-

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[4] This rule, now codified at 29 C.F.R. Section 1625.9(d)(3) (1984), was proposed on November 30, 1979, see 44 Fed. Reg. 68,858 (1979), and officially adopted on September 29, 1981, see 46 Fed. Reg. 47,724 (1981).

tional plaintiffs")--sought to join the action instituted by Graczyk. It is undisputed that the additional plaintiffs never filed timely age-discrimination charges with the EEOC relating to their retirement. On June 15, 1981, the trial court granted Graczyk leave under Fed. R. Civ. P. 21 to add the additional plaintiffs to the action. On June 19, 1981, the USWA filed a "Motion to Reconsider Granting of Plaintiff's Motion to Add Additional Plaintiffs or, in the Alternative, to Dismiss Claims of Additional Plaintiffs." The additional plaintiffs' consents were filed on July 6, 1981. Pursuant to a motion from the USWA, the court entered an order on August 13, 1981, that no new parties could be added after August 21.

On January 28, 1983, the trial court denied the USWA's motion for

reconsideration and held over the motion to dismiss. At that time, the court, after being informed that no amended complaint had been filed since the order of June 15, 1981, directed Graczyk to file an amended complaint by February 4, 1983, that would include the names and allegations of the additional plaintiffs. This amendment was apparently requested because discovery had revealed certain factual distinctions in the individual claims of the additional plaintiffs. On March 14, 1983, Graczyk filed a "Motion to File Amended Complaint Instanter." The court denied leave to file the count relating to the additional plaintiffs, but then, without explanation in the minute order, dismissed that count without prejudice. The court also stated during the hearing that the claims of the additional plaintiffs were probably time

barred. Graczyk's motion for reconsideration was denied. The additional plaintiffs then filed an appeal, designated No. 83-3044, in this court.

C. Disposition of Summary-Judgment Motions

Both Graczyk and the USWA moved for summary judgment. In its ruling of October 7, 1983, the district court, after discussing the 1978 amendments and the terms of the 1974 and 1977 agreements, noted that the 1977 contract was signed before the enactment of the 1978 amendments and that Congress "itself provided for retroactive effectiveness, insofar as benefit plans were concerned, by the . . . provision exempting them if 'in effect' by September 1, 1977, although not necessarily written or signed." Relying on the legislative history of the 1978 amendments, the district court

concluded that it was consistent with Section 2(b) to find that the 1977 agreement was "in effect" on that date. The conflicting interpretations of the DOL and the EEOC were also noted; although the court found the DOL's construction more persuasive in view of that agency's extended experience with collective-bargaining agreements, it ultimately concluded that neither interpretation was "binding." The court then held that there was no genuine issue of material fact, and that a bona-fide benefit plan that called for retirement at age 65 and that was not a subterfuge designed to evade the purposes of the ADEA was in effect between the USWA and the SOC on plaintiff Graczyk's retirement date, and that this plan was exempt from the 1978 amendments. 5 Accordingly, the USWA's

summary-judgment motion was granted and Graczyk's motion was denied. Graczyk then filed an appeal, designated No. 83-2968, in this court, which was subsequently consolidated with the appeal of the additional plaintiffs, No. 83-3044.

II

A. Section 2(b) Exemption

Appellants initially argue that the exemption of Section 2(b), which extends to collective-bargaining agreements that were "in effect on September 1, 1977," can refer only to those agreements that were negotiated and signed by, as well as

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[5] In so ruling, the district court expressly rejected the Sixth Circuit's decision in Anness v. United Steelworkers of America, 707 F.2d 917 (6th Cir. 1983), which held that the same 1977 USWA agreement was not "in effect" on September 1, 1977, for the purposes of Section 2(b) of the 1978 amendments. See infra note 12.

effective on, that date. We disagree. [6]

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[6] We also reject Graczyk's arguments that he was not retired (A) pursuant to a "bona fide" seniority or employee-benefit plan within the meaning of ADEA Section 4(f)(2) or (B) pursuant to a collective-bargaining agreement, so that the Section 2(b) exemption is not available. With reference to the first argument, the USWA 1966 retirement policy, which antedated the enactment of the ADEA, is inexorably linked to the seniority provisions of the collective-bargaining agreement and also controls the application of the pension plan, as it is the status of the staff representative under the agreement that determines the eligibility requirements and benefit levels. Appellants in fact concede that the 1966 policy was a part of the pension plan. In addition, the 1977 agreement, in its article VIII(3) and appendix A, specifically refers to the pension plan. Thus, the policy met the criteria of Section 4(f)(2) prior to the 1978 amendments. It should also be noted that employees at age 65 were not within the class protected by the ADEA prior to the 1978 amendments. Mandatory retirement at age 65, therefore, could be imposed without regard to the Act. The USWA's retirement policy, however, does now violate the ADEA as amended. In order for an agreement to come within the exemption of Section 2(b), the employee need only be forced to retire pursuant to a collective-bargaining agreement that was in effect on the relevant date under terms that would now violate the ADEA. We have determined that the 1977 agree-

The starting point, of course, in construing any provision is the language of the statute itself. See Reiter v. Sonotone Corp., 442 U.S. 330, 337, 99 S.

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ment was "in effect" on the proper date and that it does violate the current version of the ADEA.

With reference to the second argument, it is true that the actual wording of the policy does not physically appear in the contract, but it is incorporated by reference into the agreement; thus, the three requirements of Section 2(b) are satisfied.

In his statement of facts, Graczyk claims that the USWA did not impose the same mandatory retirement policy on its elected officials, but has failed to present any legal argument to this court on this point. A party's description of the factual circumstances of a dispute does not impose on the reviewing tribunal an obligation to divine from that recitation all possible legal issues and then to resolve those issues. Any challenge to the USWA's treatment of its elected officials is foreclosed if those issues are not adequately presented by the appellant or raised by a cross-appellant. See City of Chicago v. United States Dep't of Labor, 753 F.2d 606, 607 n.1 (7th Cir. 1985); cf. Fed. R. App. P. 28(a).

Ct. 2326, 2330 (1979). As a matter of common usage, the term "in effect" is not limited to prospective effectiveness, but also covers retroactive application. Stated in another manner, the term "in effect" certainly includes agreements that are "entered into," "signed," or "in existence" by the relevant date, but also includes those that are "entered into," "signed," or "in existence" after their effective date. The term does not focus on the actual timing of the agreement's execution and implementation, but rather on the intentions of the parties to the agreement, as it is the parties that decide when an agreement shall be effective. They may intend that their agreement be given retroactive application in order to maintain a catenation of contracts--certainly a salutary practice in

the collective-bargaining context [7]-- without regard to the vicissitudes of their negotiation practices. It would be improvident for this court to find as a matter of law that a legislative exemption referring to agreements "in effect" on a certain date, without further elaboration, would be restricted to only those agreements entered into or in existence prior to that date and that retroactive application was, therefore, necessarily excluded. Congress has not ordinarily used the term in such a limited fashion, and has in fact demonstrated that, when it seeks to exclude retroactive agreements from a certain provision, it is

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[7] For example, retroactive application may held prevent strikes, because it guarantees that employees will be compensated for those hours worked after the expiration of the prior agreement at the new pay scale that is ultimately negotiated.

capable of so indicating in an unequivocal fashion. See, e.g., Civil Service Reform Act of 1978, 5 U.S.C. Section 7135(a); ERISA, 26 U.S.C. Section 410 note (effective date and transitional rules), 29 U.S.C. Sections 1086(b), 1114(b)(2), 1322(b)(1), (7); Act of June 23, 1947, ch. 120, section 102, 61 Stat. 152 (effective date of amendments to National Labor Relations Act).

Indeed, the wording of Section 2(b) itself illustrates this distinction. Three requirements must be met before a collective-bargaining agreement is entitled to the exemption: it must be (1) "in effect on September 1, 1977," (2) "entered into by a labor organization," and (3) "otherwise prohibited by the amendment" of 29 U.S.C. Section 631 (emphasis added). If Congress meant to exempt only those agreements entered into

by a labor organization before September 1, 1977, then we are held pressed to understand why it would choose this particular formulation. To the contrary, we conclude from the language of Section 2(b) that Congress sought to maintain a distinction between the execution of an agreement and its effective date. Thus, Section 2(b) does not suggest that agreements signed after September 1, 1977, with an effective date of August 1, 1977, are excluded from the exemption. [8] We move then to a consideration of the legislative history.

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[8] We reject appellants' assertion that this court concluded in EEOC v. County of Calumet, 686 F.2d 1249, 1257 (7th Cir. 1982), that the exemption of Section 2(b) covered only those agreements negotiated before, and in effect on, September 1, 1977. The meaning of the term "in effect" was not presented in Calumet, as the collective-bargaining agreement under consideration did not become effective until January 1, 1979. Id.

The legislative reports relating to Section 2(b) neither provide a definition of the term "in effect" nor discuss the exemption in the context of collective-bargaining agreements that are given retroactive application. Nonetheless, the policy behind the provision was clearly articulated:

> The reason for the extended effective date . . . is to recognize, and provide maximum deference to, contracts negotiated between management and labor, consistent with the committee's desire to end mandatory retirement of those workers under age 70. The committee recognizes that these contracts were negotiated in good faith and that reciprocal agreements and concessions were made in exchange for the mandatory retirement provision.

(emphasis added). S. Rep. No. 493, 95th Cong. 1st Sess. 11 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 504, 514. [9]

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[9] See also H.R. Rep. No. 527, 95th Cong., 1st Sess. 8-9 (1977).

The statements of Representative Hawkins paralleled the policy expressed in S. Rep. No. 493.

> [With respect to] the amendment to delay the effective date for collectively bargained employee benefit plans, the precedent for such a delay was established in the Equal Pay Act of 1963. I would like to quote from the May 23, 1963, Congressional Record in which then-Congressman Robert Griffin states: " . . . it should be the policy of Congress, I think, not to open up collective bargaining agreements in effect if that is not absolutely necessary. We want to encourage industrial peace and stability, and we do not wish unnecessarily to stir up strikes or labor strife."

123 Cong. Rec. 30,563 (1977); see also id. at 34,296 (1977) (remarks of Sen. Williams).

It could, of course, be argued that the ADEA is a "remedial" provision and, therefore, that any exception, including that of Section 2(b), must be narrowly construed. As a general matter, the ADEA may benefit from the presumptions associ-

ated with a "remedial" statute. See, e.g., Zimmerman v. North American Signal Co., 704 F.2d 347, 353 (7th Cir. 1983). This characterization, however, does not invest the Act with a sort of talismanic quality so that all other canons of statutory construction will be disregarded. Cf. id. Indeed, in this particular case, where Congress sought to extend "maximum deference" to collective-bargaining agreements, the force of the presumptions in favor of such agreements at least equals, and perhaps overwhelms, the force of the presumptions associated with a "remedial" statute. Stated in another manner, a narrow construction of the Section 2(b) exemption is inconsistent with the express desire of the legislature to accord highly deferential treatment to labor organizations.

Thus, in view of the language of

Section 2(b) and the strong legislative expressions of the need to accord "maximum deference" to collective-bargaining agreements, we conclude that Congress intended that any doubtful situation be resolved in favor of upholding such agreements. Absent an explicit declaration from Congress to the contrary, we cannot impute to the legislature an intent in Section 2(b) to disregard terms such as those under consideration that are the legitimate result of the collective-bargaining process. Cf. EEOC v. United Air Lines, Inc., 755 F.2d 94, 98 (7th Cir. 1985); Sikora v. American Can Co., 622 F.2d 1116, 1122-24 (3d Cir. 1980). Indeed, this court acknowledged in EEOC v. County of Calumet, 686 F.2d 1249, 1257 (7th Cir. 1982), Congress's recognition that "valuable consideration is sometimes given in collective bar-

gaining for concessions which may be prohibited under the ADEA," and that Congress took account of the possible loss of bargain in Section 2(b). [10]

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[10] With reference to the conflicting construction of Section 2(b) rendered by the DOL and EEOC, we acknowledge that, while we are not bound by these pronouncements, administrative interpretations are ordinarily entitled to deference. However, in view of the conflicting interpretations, we must undertake our own independent analysis of the meaning of Section 2(b). The courts remain the final authority on issues of statutory construction and must reject administrative interpretations that are inconsistent with the statutory mandate or that undermine the policies Congress sought to implement. See Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 31-32, 102 S. Ct. 38, 42 (1981). Moreover, if, as in this case, the provision under consideration does not call for special expertise or competence in its interpretation, the judiciary is at least as qualified as an administrative agency to provide that interpretation. Cf. McKart v. United States, 395 U.S. 185, 197-99, 89 S. Ct. 1657, 1665 (1969).

We have concluded after our own independent consideration that the 1977 agreement does come within the exemption of Section 2(b). We, therefore, reject

The parties to the 1977 agreement intended for that contract to govern their respective rights and obligations for events occurring on September 1, 1977, and thus they clearly considered it "in effect" on that date. Both appellants and appellee agree that the 1974

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the EEOC's belated interpretation to the extent that the latter, when applied to these facts, would exclude the 1977 agreement from the exemption. In view of this disposition, we need not consider the USWA's argument that, after the Supreme Court's decision in INS v. Chadha, 462 U.S. 919, 103 S. Ct. 2764 (1983), the EEOC did not have the authority to issue the interpretation because the transfer of jurisdiction to that agency for the implementation of the ADEA was made pursuant to legislation containing a one-house veto provision. Compare EEOC v. CBS, Inc., 743 F.2d 969 (2nd Cir. 1984) (EEOC without authority after Chadha) with EEOC v. Hernando Bank, Inc., 724 F.2d 1188 (5th Cir. 1984) (EEOC retains authority despite Chadha). In addition, although the parties have not so informed us, it would appear that recent congressional enactments may have mooted any question concerning the EEOC's authority to implement the ADEA. See EEOC v. CBS, Inc., 748 F.2d 124 (2d Cir. 1984).

agreement expired on August 1, 1977. It could be argued that the 1974 agreement remained provisionally in force during the negotiations, but only in the sense that it would maintain the status quo until a new agreement was signed. In any event, the new agreement, as required by the prior contract, stated unequivocally that it "supersede[d] and replace[d]" the 1974 agreement. There is no question that retroactivity was a well-established practice between the parties, [11] that valuable concessions were made by the employer in exchange for the mandatory retirement provisions, and that those provisions were in no way a subterfuge

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[11] In fact, the 1971 agreement was not formally signed until April 18, 1972, but was dated, and made effective on, August 1, 1971. Similarly, the 1974 agreement was not formally signed until February 14, 1975, but was dated, and made effective on, August 1, 1974.

designed to avoid the effect of the 1978 amendments. Furthermore, it should also be noted that the parties had an excellent business justification for retroactive effectiveness. July 31, 1977, was significant because the 1974 collective bargaining agreements the USWA had signed with the ten leading steel companies expired on that date. Subsequent agreements signed with those industries were to be made effective as of August 1, 1977. Under the express terms of the 1974 agreement with the SOC, negotiations could not even begin with the USWA until the latter had completed negotiations for the workers represented in the aluminum, non-ferrous, and basic steel industries. Nonetheless, retroactive application ensured that the USWA staff representatives would not be economically disadvantaged by this coordinated sequence of

contract expirations, as any new agreement SOC negotiated on behalf of its members would become effective on the same date as any new agreement the USWA negotiated with the steel industry on behalf of the USWA members.

In conclusion, we find that the 1977 agreement was exempt under Section 2(b) of the 1978 amendments and affirm the district court's decision that Graczyk's retirement was not a violation of the ADEA. [12]

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[12] As we observed in note 5, supra, the Sixth Circuit in Anness v. United Steelworkers of America, 707 F.2d 917 (6th Cir. 1983), concluded that the 1977 USWA agreement was not "in effect" on September 1, 1977, for the purposes of Section 2(b). The court found that the term "in effect," without more, "would seem to preclude" the 1977 agreement. For the reasons previously stated, we cannot endorse this restrictive construction. The Sixth Circuit also relied on the EEOC regulation, whereas we have concluded that, under these facts, reliance on the regulation is inappropriate and that this administrative interpretation is incon-

B. Additional Plaintiffs

Before considering the claims of the additional plaintiffs, we must first discuss the status of Calacci, Howard,

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sistent with the language and purposes of Section 2(b) to the extent that it would place the 1977 agreement outside the exemption.

Another ground for the Anness decision was the discussion of Section 2(b) in S. Rep. No. 493 (see supra text preceding note 9). The Sixth Circuit, looking to the Report's use of the word "negotiated," stated that "the fair inference as to intent would be that the exemption would apply as to those collective bargaining agreements already negotiated and/or effectuated before September 1, 977." Anness, 707 F.2d at 921. We cannot concur in this conclusion. The Senate Report does evince a solicitude for contracts "negotiated between management and labor" "in good faith." It does not in any way suggest, however, that those negotiations must have been completed before the necessarily arbitrary date of September 1, 1977. To the contrary, it is clear that Congress's overriding concern was with the detrimental reliance by employers on the ADEA before the 1978 amendments. The timing of the negotiations is not alluded to in the Report.

and Picard, because the record evinces considerable confusion on the part of the court, as well as the litigants, as to whether these three individuals were actually parties to this action. The minute order of March 14, 1983, is illustrative of that confusion, as it first denies leave to file an amended complaint that included Calacci, Howard, and Picard, as well as their claims, but then dismisses the amendments relating to the additional parties without prejudice. In addition, the transcripts of later proceedings indicate that the district court considered Calacci, Howard, and Picard to have been parties to the litigation since the order of June 15, 1981, even though they were not named as plaintiffs in the original complaint and no amendment relating to them was subsequently allowed.

We, of course, must attempt to give meaning to the rulings and procedural solecisms present in the record. The parties have given us little guidance in this matter. After a thorough consideration of the record, we conclude that the order of June 15, 1981, constituted an exercise of the court's discretionary power under Fed. R. Civ. P. 21 to add Calacci, Howard, and Picard as parties to this litigation, that the court deemed the original complaint to have been amended by operation of law to conform to that ruling, and that the court did not condition the inclusion of these three individuals on the submission of an amended complaint. Thus, Calacci, Howard, and Picard were in fact parties when, on March 14, 1983, leave to add Count II was denied and Count II was dismissed without prejudice. It was,

therefore, error to dismiss the parties on the basis of the late amendment, as the addition of Count II was, in view of the prior rulings of the court, a technicality that would simply conform the pleadings to those prior rulings. Because the court did apparently act on the assumption that the additional plaintiffs were in the action under the original complaint and because it made no mention of the additional plaintiffs in the summary-judgment order of October 7, 1983, the only tenable explanation for the dismissal of Calacci, Howard, and Picard from the action was the court's repeated observation that their cause of action was time barred and thus failed to state a claim upon which relief could be granted. Thus, in considering the proceedings as a whole and the district court's stated reasons for disallowing

the amendment of the complaint, we construe the order of March 14, 1983, as a dismissal of the additional plaintiffs with prejudice.

In view of our affirmance of the district court's grant of the USWA's summary-judgment motion, it is unnecessary for us to determine whether the claims of Calacci, Howard, and Picard are in fact time barred because, even if timely, thee allegations still fail to state a claim for relief. Similarly, even though it was error to deny the amendment of the original complaint, we may uphold the dismissal of the additional plaintiffs on the basis of our discussion in section II(A), supra. The gravamen of the claims of the additional plaintiffs is that their compulsory retirement in 1979 at age 65 pursuant to the 1977 agreement violated the ADEA as

amended in 1978. Thus, a determination that appellant Graczyk's retirement was lawful necessarily forecloses recovery for the additional plaintiffs. The dismissal of Calacci, Howard, and Picard, therefore, will be affirmed.

III

For the reasons stated above, the summary-judgment order in favor of the USWA in appeal No. 8[3]-2968 is AFFIRMED. The district court's judgment of dismissal in appeal No. 83-3044 is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTHONY J. GRACZYK, Plaintiff,	)	
v.	)	No. 80 C 2909
UNITED STEELWORKERS OF AMERICA, Defendant.	)	

D E C I S I O N

Defendant filed a motion for summary judgment on June 15, 1981, supporting it with numerous affidavits. After partial briefing and other intervening proceedings, plaintiff filed his motion for summary judgment on April 19, 1983. Defendant filed a supplemental affidavit in support of its motion on May 16, 1983, and briefing on all motions was finally completed on June 9, 1983.* The

issue between the parties is whether plaintiff can be mandatorily retired by the defendant on October 1, 1979 at age 65 in view of the 1978 amendments to the Age Discrimination in Employment Act raising the maximum age of discrimination to 70 years but exempting seniority systems or pension plans under a collective bargaining agreement which was "in effect on September 1, 1977."

It appears that the defendant's collective bargaining contract was actually signed in writing on November 1, 1977 but "dated as of August 1, 1977" and made "effective August 1, 1977." That contract superseded and replaced one between the parties dated August 1, 1974, which specifically provided in Article

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*The court received supplementary letters from both parties subsequent to briefing but considered them of no significance in view of the following decision.

XI:

> ...that it "will continue in effect until such time as the United Steelworkers of America has completed negotiations and reached new agreements with the aluminum industry, non-ferrous and basic steel industry, in 1977. Not later than 30 days' [sic] thereafter, the parties will make arrangements to meet and negotiate a new agreement... . It is further understood that the effective date of any Agreement reached by the parties subsequent to July 31, 1977 shall be effective August 1, 1977 unless otherwise mutually agreed." [emphasis in original] [Par. 8 of the affidavit of Eliot Bredhoff filed July 2, 1981.]

There is no dispute that the retroactive provision in the 1977 contract was made in good faith and not for the purpose of avoiding the provisions of the Age Discrimination in Employment Act. This practice of retroactive effectiveness had been followed by the parties in the past. The previous contracts had all provided for a "policy" for mandatory retirement at age 65 (Article VII, Sec.

6, to Ex. R of the Bredhoff affidavit). The contract was not executed in August 1977 because the defendant Union was occupied in negotiating a new contract with the steel industry. No change was made or requested in the Union's "policy for compulsory retirement" adopted Jan. 26, 1966 as provided in Article VII, Section 6 of the old and new contracts. The pension plan itself (Article VII, Sec. 3) continued throughout.

Section 623(f) exempts pension plans from the age requirements of the Act by the following provision in 29 U.S.C. Section 623(f):

> (f) It shall not be unlawful for an employer, employment agency, or labor organization--
> ...
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this

> chapter, except that no such employee benefit plan shall excuse the failure to hire any individual

P.L. 95-256 enacted April 6, 1978 added the following to subsection (f)(2):

> and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual;

P.L. 95-256 was made to apply to employee benefit plans "in effect on Sept. 1, 1977." It should be noted that the contract dated November 1, 1977 was signed before Congress amended the A.D.E.A. by P.L. 95-256. Congress itself provided for retroactive effectiveness, insofar as benefit plans were concerned, by the above provision exempting them if "in effect" by Sept. 1, 1977, although not necessarily written or signed.

Despite a holding of the Sixth Circuit Court of Appeals on May 26, 1983

to the contrary (Anness v. United Steelworkers of America, 707 F.2d 917), we find and conclude that defendant's mandatory retirement of the plaintiff at age 65 was not a violation of Section 623 of the A.D.E.A.

Defendant's pension plan is not actually a part of the collective bargaining contract. The mandatory retirement provision is in fact a "policy" of the International's executive board adopted July 1, 1966 (plaintiff's memorandum filed April 19, 1983, p. 24). The collective bargaining agreement was reopened for negotiation pursuant to Article XI by letter of may 9, 1977 sent to defendant by plaintiff's bargaining representative. (Jenske affidavit filed July 2, 1981, Ex. B.) But the letter did not mention the pension plan nor terminate the collective bargaining contract.

Article XI (supra, p. 2) provided that it would continue in effect until a new agreement was reached.

The 1974 provision for retirement and pensions therefore continued in effect between August 1, 1977 when the contract provisionally expired and November 1, 1977 when the new contract was signed with the retroactive provisions in it. So far as the record shows, both parties continued to abide by the terms of the old contract. In fact, we feel sure that defendant would have been liable if it had not paid pensions to retired employees between August 1 and November 1, 1977. The new contract was specifically made retroactive, as had been anticipated and provided for in writing in the old contract, and there is no reason whatsoever to fail to give effectiveness to these written terms of

the collective bargaining agreements.

The intent of Congress is reasonably well explained in Senate Report No. 95-493, reprinted in U.S. Code Congressional and Administrative News, 504, 518 (1978), as follows:

> The reason for the extended effective date for collectively bargained employee benefit plans is to recognize, and to provide the maximum deference to contracts negotiated between management and labor,consistent with the committee's desire to end mandatory retirement of those workers under age 70. The committee recognizes that these contracts were negotiated in good faith and that reciprocal agreements and concessions were made in exchange for the mandatory retirement provision... . This postponed effective date would only apply to pension plans which were negotiated as part of a collective bargaining agreement... .

Unfortunately, two different governmental agencies rendered conflicting opinions to the defendant on this subject. Donald Elisburg, Assistant Secretary for Employment Standards of the

Department of Labor, rendered a verbal opinion to the effect that the Department of Labor was unanimous that any agreement which was retroactive to a date prior to September 1, 1977 would be considered to be in effect on that date if the purpose of the retroactivity was not a subterfuge to avoid the application of the A.D.E.A. amendments. This opinion was not in writing as required by 29 U.S.C. Section 259, but it was issued by the Department of Labor when it was responsible for administering the Act and was relied upon by the defendant.

On the other hand, when the E.E.O.C. acquired jurisdiction over the Act, it adopted a regulation on September 20, 1981 that the exemption of Section 623(f) did not apply to a collective bargaining agreement which expired prior to September 1, 1977, even if a new

agreement was subsequently signed to a date effective retroactively to the expiration date of the previous agreement. 46 Fed. Reg. 188, p. 47726, 47728 and Section 1625.9(d)(3).

If we were to choose between the Department of Labor's and the Equal Employment Opportunity Commission's interpretation, we would rely upon the expertise of the former, since it has had a long history of dealing with collective bargaining contracts. The E.E.O.C., on the other hand, follows the affirmative policy of searching for every possible discrimination under its jurisdiction, in its capacity of enforcing remedial statutes. In any event, neither of these conflicting interpretations of Section 623(f) and related sections of the A.D.E.A. are [sic] binding upon this court. Nor are they specifically appli-

cable to a collective bargaining contract that continued in effect during negotiations between July 31, 1977 and November 1, 1977.

Based on the affidavits filed by defendant and the lack of any counteraffidavits by plaintiff, we find and conclude that there is no genuine issue of material fact and that a "bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter" was in effect between the defendant and the plaintiff's collective bargaining agent providing for his retirement at age 65 on October 1, 1979 and that this agreement is exempt from the 1978 amendments to the A.D.E.A. which raised the age of discrimination to 70. Therefore, we grant defendant's motion for summary judgment and deny the motion

of the plaintiff. A Rule 58 judgment in favor of defendant will be entered.

ENTER:

/s/ Thomas R. McMillen
Judge, United States
District Court

DATED: October 7, 1983

FILED
OCT 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-257

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANTHONY J. GRACZYK, JOHN HOWARD,
PETER CALACCI, AND HAROLD PICARD,
Petitioners

vs.

UNITED STEELWORKERS OF AMERICA,
Respondent

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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Age Discrimination In Employment Act, as amended

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TEXT OF PERTINENT STATUTE:

§2(b) of Pub.L. 95-256, 92 Stat. 189 (1978) provides in full:

> The amendment made by subsection (a) of this section [amending subsec. (f)(2) of this section] shall take effect on the date of enactment of this Act [Apr. 6, 1978], except that, in the case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977, which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938 [section 206(d)(4) of this title]), and which would otherwise be prohibited by the amendment made by section 3(a) of this Act [amending section 631 of this title], the amendment made by subsection (a) of this section [amending subsec. (f)(2) of this section] shall take effect upon the termination of such agreement or on January 1, 1980, which ever occurs first.

No. 85-257

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANTHONY J. GRACZYK, JOHN HOWARD,
PETER CALACCI, AND HAROLD PICARD,
Petitioners

VS.

UNITED STEELWORKERS OF AMERICA,
Respondent

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

The pending Petition for Writ of *Certiorari* rests solely on the conflict between the decision of the Seventh Circuit below[1] and that of the Sixth Circuit in *Anness v. United Steelworkers of America*, 707 F.2d 917 (6th Cir., 1983). Though such a conflict surely exists, it is not one this Court need or should resolve since it involves interpretation of a narrow statutory exemption which expired nearly six years ago and cannot conceivably have an impact on anyone other than the one employer and four employees who are the parties in this case.

1. The opinion of the Seventh Circuit is officially reported as *Graczyk v. United Steelworkers of America*, 763 F.2d 256 (7th Cir., 1985).

STATEMENT OF THE CASE

1. Respondent, United Steelworkers of America, "USWA", is a labor organization representing workers in the steel and related industries. (App. A-3)[2] USWA employs approximately 800 staff representatives, who act as its agents for purposes of servicing its constituent local unions. (*Ibid.*) All four Petitioners were employed as staff representatives by USWA. (App. A-3, 12).

USWA's staff representatives are themselves represented for collective bargaining purposes by an independent labor organization, the Staffman's Organizing Committee, "SOC". (App. A-3). In six successive agreements executed in 1966, 1968, 1970, 1971, 1974, and 1977, the parties had incorporated a policy of mandatory retirement at age 65. (App. A-4). The Petitioners were retired at age 65 in 1979 under the terms of the 1977 agreement.[3] (*Ibid.*)

In their 1974-77 agreement, dated August 1, 1974, the parties had explicitly provided that the effective date of any successor agreement reached subsequent to July 31, 1977, would be August 1, 1977. (App. A-5). This 1974 understanding reflected the parties' recognition that USWA's contracts with the ten major steel producers were to expire on July 31, 1977, and that USWA needed to reach new agreements for its members before it could negotiate a contract with its own employees. (App. A-5, 31).

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2. Citations to "App." refer to the Appendix to the Petition For Writ Of *Certiorari*. The opinion of the Court of Appeals is Attachment A to the Appendix.

3. A factual dispute existed below as to whether Petitioner Picard voluntarily retired. This question is immaterial to the pending Petition.

On August 1, 1977, the 1974 agreement expired. (App. A-29, 30). Prior to its expiration, the parties began negotiations for a new agreement in July, 1977, which negotiations were completed on October 12, 1977. (App. A-5). The contract was formally signed on November 1, 1977, and provided that:

> This Agreement, *dated as of August 1, 1977*, is between the [USWA] and the [SOC]. Except as otherwise specified herein, the provisions of this Agreement shall be *effective August 1, 1977*. This Agreement supercedes and replaces the agreement between the parties dated August 1, 1974. (App. A-5, 6, emphasis added)

This retroactivity feature of the 1977 Agreement was wholly consistent with the past practice of USWA and SOC. (App. A-30). Thus, their 1971 agreement was not executed until April 18, 1972, but was dated and made effective on August 1, 1971. (App. A-30, f.11). And their 1974 agreement, which was signed on February 14, 1975, was dated and made effective on August 1, 1974. (*Ibid.*)

2. When the 1977 agreement was negotiated, its policy of mandatory retirement at age 65 was clearly lawful under this Court's decision in *United Air Lines Inc. v. McMann*, 434 U.S. 192 (1977). (App. A-6). However, *McMann* was overruled by the 1978 amendments to the Age Discrimination in Employment Act, P.L. No. 95-256, 92 Stat. 189 (1978), which altered the Act in two relevant aspects. (*Ibid.*) First, §12 of ADEA, 29 U.S.C. §631, was amended, effective January 1, 1979, to raise the upper limit of the protected class from age 65 to age 70. (*Ibid.*)

Second, §4(f)(2) of the Act, 29 U.S.C. §623(f)(2),[4] prohibited mandatory retirement pursuant to a bona-fide pension plan or seniority system of any individual within the class specified by §12. (App. A-7).

The effective date of the amendment to §4(f)(2) was spelled out in §2(b) of P.L. No. 256, 92 Stat. 189 (1978), which provided in pertinent part:

> The amendment [to 29 U.S.C. §623(f)(2)] shall take effect on [April 6, 1978] except that, in the case of employees covered by a collective bargaining agreement *which is in effect on September 1, 1977*, which was entered into by a labor organization . . . and which would otherwise be prohibited by [29 U.S.C. §631] the amendment [to 29 U.S.C. §623(f)(2)] shall take effect upon the termination of such agreement *or on January 1, 1980*, which ever occurs first. (App. A-8, emphasis added).

Following their passage, USWA sought an opinion from the Department of Labor as to the effect of the 1978 Amendments on its policy of mandatory retirement at age 65. (App. A-8, 9). On July 21, 1978, counsel for USWA met with Donald Elisburg, Assistant Secretary of Labor for Employment Standards, and other Department of Labor officials to determine whether the agreement, dated August 1, 1977, would be deemed "in effect" on September 1, 1977, within the meaning of §2(b). (*Ibid.*) At the meeting, the Department of Labor officials informed USWA that it qualified for the §2(b) exemption.

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4. Sections 12 and 4(f)(2), as amended, are set forth in the Petition at xi-xii.

(App. A-9)[5] Thereafter, USWA continued to enforce its age 65 retirement policy until January 1, 1980.

3. Two lawsuits were filed in 1980 by staff representatives challenging USWA's mandatory retirement policy. One action was filed in the Northern District of Ohio by Frank Anness. A second was begun in the Northern District of Illinois by Petitioner Anthony Graczyk, in which action Petitioners John Howard, Peter Calacci, and Harold Picard joined as additional plaintiffs. In both suits, USWA prevailed in the District Court on summary judgment.[6]

On appeal, the Sixth Circuit reversed, and the Seventh Circuit affirmed. In so doing, they disgreed on a single narrow issue of statutory construction: whether the §2(b) exemption encompassed agreements executed subsequent to September 1, 1977, but made retroactive by their terms to be effective on that date. The Sixth

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5. Responding to an inquiry from Leroy D. Clark, EEOC General Counsel, Assistant Secretary Elisburg provided an account of the meeting in a letter, dated October 20, 1980:

> To the best of my recollection we were unanimous in stating that such an agreement would be considered by us to be 'in effect on September 1, 1977' *if* the purpose of the retroactivity was not a subterfuge to get around the purposes of the Act and to avoid application of the ADEA amendments as of January 1, 1979. As we were informed by the [USWA's] counsel that such retroactivity was completely consistent with past practice, that the retroactivity feature of the 1977 contract was agreed to by the parties in 1974, and that the retroactiviy became effective when the current 1977 agreement was signed, which was well before the adoption of the ADEA amendments, it seemed clear to us that the retroactivity was not a bad faith effort by the [USWA] to get around the new age 70 mandatory retirement age. (App. A-9, 10, emphasis in original letter)

6. The opinion of the Northern District of Ohio is unofficially reported as *Anness v. United Steelworkers of America*, 26 FEP 1340 (N.D.Ohio, 1981). The opinion of the District Court below is reproduced at App. B-1.

Circuit held in 1983 that it did not. The Seventh Circuit held in 1985 that it did. Apart from these two decisions, no other reported cases have considered this question, and we are unaware of any litigation, other than the two USWA actions, raising the issue. At present, only this case survives, the *Anness* suit having been dismissed on July 18, 1985, pursuant to a voluntary settlement by the parties following remand.

ARGUMENT

We believe that the Seventh Circuit was right, and we wholly endorse its reasoning. (See: App. A-17:32) But the controlling question at this juncture is not which Court of Appeals was correct. Rather, it is whether the conflict is sufficiently important to warrant the granting of the Petition. Clearly, it is not.[7]

Crucially, the conflict at bar turns on an interpretation of an expired statute. It has long been understood that review of such a conflict will be denied to husband the scarce decisional resources of this Court. Thus, Mr. Justice Harlan, writing as if he had this very case in mind, observed a quarter century ago:

> [F]inally, even where a "true" conflict may be said to exist, *certiorari* will sometimes be denied . . . where

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7. The Petition also presents a second question for review: "whether the consenting Petitioners are time-barred from joining into the originating Petitioner's timely-filed suit." (Petition, i). Petitioners acknowledge that this issue was not addressed by the Seventh Circuit but suggest that judicial economy would be served if it were taken up by this Court. (*See*: Petition at 34-35). We believe the opposite to be true, and past opinions of this Court holding that such issues are to be reserved for remand support our view. *See e.g.*: *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 at 568 (1981) *United States v. United Continental Tuna Corp.*, 425 U.S. 164 at 181-82 (1976), and *Wood v. Strickland*, 420 U.S. 308 at 326-327 1975). Accordingly, the second question provides no support for granting the Petition.

> the impact of the conflict is narrowly confined and is not apt to have continuing future consequences *as where a statute has been repealed or is about to expire . . .*" Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austral L.J. 108 at 112 (1959) [emphasis added].

Here, of course, the underlying statute is not merely about to expire; it is long dead. Section 2(b) lapsed on January 1, 1980, the last date on which any employer could have lawfully retired any employee at age 65 under its terms. Thus, the question presented by the Petition has been academic for nearly six years and can never arise again. In short, the expiration of the statute has made the problem go away. In such circumstances, this Court has repeatedly denied Petitions for review of conflicts. *See, e.g.: United States v. Abrams*, 344 U.S. 855 (1952); *Community Services, Inc. v. United States*, 342 U.S. 932 (1952); *Sokol Bros. Co. v. Commissioner*, 340 U.S. 952 (1951); *United States v. Beal*, 340 U.S. 852 (1950).[8] An identical result is warranted here.

An independent basis for denying the Petition is grounded in the realization that the question of whether the §2(b) exemption reaches retroactively effective collective bargaining agreements was raised in no other case, past or present, other than *Anness* and is of importance, therefore, only to USWA and the Petitioners here. This court, in turn, has long emphasized that it does not " . . . sit for the benefit of the particular litigant." *Rice v. Sioux City Memorial Park Cemetary*, 349 U.S. 70 at 74 (1955). And where, as here, the question presented is of importance to only the parties and not the public, a Petition is properly denied. *id.* at 79.

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8. These four cases are discussed in Stern, "Denial of Certiorari Despite a Conflict," 66 Harv. L. Rev. 465 at 466-68 (1953) and Stern and Gressman, *Supreme Court Practice*, §4.4 at 270-71, (5th ed., 1978).

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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